

## Brooklyn Journal of International Law

---

Volume 17 | Issue 2

Article 8

---

12-1-1991

### COMMENT: Title VII, The Age Discrimination in Employment Act and the Friendship commerce and Navigation Treaty - An Ongoing Conflict: An Analysis of *MacNamara v. Korean Air Lines*

Andrew J. Lauer

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

#### Recommended Citation

Andrew J. Lauer, COMMENT: Title VII, The Age Discrimination in Employment Act and the Friendship commerce and Navigation Treaty - An Ongoing Conflict: An Analysis of *MacNamara v. Korean Air Lines*, 17 Brook. J. Int'l L. 423 (1991).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol17/iss2/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# COMMENTS

## TITLE VII, THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND THE FRIENDSHIP COMMERCE AND NAVIGATION TREATY — AN ONGOING CONFLICT: AN ANALYSIS OF *MacNAMARA v. KOREAN AIR LINES*

### I. INTRODUCTION

Despite the many attempts to guarantee all men and women equal treatment under the law, nothing has given greater impetus to shattering the bonds of discrimination in employment than the enactment of Title VII of the Civil Rights Act of 1964 (Title VII).<sup>1</sup> Title VII prohibits discrimination on the basis of "race, color, religion, sex or national origin."<sup>2</sup> In addition to Title VII, the Age Discrimination in Employment Act of 1967<sup>3</sup> (ADEA) filled the gap left by Title VII in antidiscrimination legislation. The ADEA prohibits employment discrimination based on an individual's age.<sup>4</sup>

Although these statutes have effectively deterred employment discrimination within the United States, the expansion of international trade and the concurrent proliferation of multinational corporations employing United States workers have created many new issues and conflicts with regard to the application of these statutes to foreign corporations. Among these issues is the application of Title VII and the ADEA to foreign and United States corporations employing United States citizens abroad, and to foreign corporations doing business within the United States. These issues are further complicated by interna-

---

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1990).

2. Title VII, 42 U.S.C. § 2000e-2(a)(1) (1990).

3. Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621-34 (1990).

4. 29 U.S.C. § 623(a)(1) (1990).

tional treaties and trade agreements, such as the Friendship, Commerce and Navigation Treaty (FCN Treaty) between the United States and the Republic of Korea.<sup>5</sup> The treaty, which contains a clause allowing Korean corporations the right to "engage . . . executive personnel . . . of their choice,"<sup>6</sup> seems to be in direct conflict with both Title VII and the ADEA, thus posing a severe threat to the application and protection otherwise afforded by these antidiscrimination statutes.

The FCN Treaty seems to conflict with the antidiscrimination statutes' prohibition against discrimination in employment by allowing foreign corporations the absolute right to hire employees of their choice.<sup>7</sup> Since similar treaties exist with many other foreign nations,<sup>8</sup> and as a result of the vast influx of foreign investors and corporations into the United States today, this conflict is arising more often. Although three other United States Courts of Appeal have faced this issue,<sup>9</sup> the Third Cir-

5. Treaty of Friendship, Commerce and Navigation, November 7, 1957, the United States — Republic of Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947 [hereinafter FCN Treaty].

6. FCN Treaty, *supra* note 5, at art. VIII(1).

7. FCN Treaty, *supra* note 5, at art. VIII(1).

8. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, November 4, 1946, United States — China, 63 Stat. 1299, T.I.A.S. No. 1871; Treaty of Friendship, Commerce and Navigation, October 29, 1954, United States — Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, August 3, 1951, United States — Greece, 5 U.S.T. 550, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, August 23, 1951, United States — Israel, 5 U.S.T. 550, T.I.A.S. No. 551; Treaty of Friendship, Commerce and Navigation, February 2, 1948, United States — Italy, 63 Stat. 2255, T.I.A.S. No. 1965; Treaty of Friendship, Commerce and Navigation, April 2, 1953, United States — Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation, March 27, 1956, United States — The Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942; and Treaty of Friendship, Commerce and Navigation, November 12, 1959, United States — Pakistan, 12 U.S.T. 110, T.I.A.S. No. 4683.

9. *See Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982). In that case, secretaries brought a class action against a wholly-owned subsidiary of a Japanese corporation, alleging that the corporation had a discriminatory policy of filing its management-level positions exclusively with male Japanese nationals. The Second Circuit held that the FCN between the United States and Japan, containing a clause identical to article VIII(1) of the FCN Treaty, did not exempt a Japanese company from Title VII coverage. The court used the Bona Fide Occupational Qualification exception, *see infra* note 64, as a tool for eliminating the conflict between the statute and Title VII; *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982) (holding that the Treaty provisions totally shielded the company from the domestic antidiscrimination statutes); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984) (holding that a similar clause in the Greek FCN Treaty provided only a restricted exemption to give preference to Greek citizens).

cuit's decision in *MacNamara v. Korean Air Lines*<sup>10</sup> addressed this dilemma in a more direct manner and also discussed and compared its analysis with the various Circuit Court decisions which preceded this case. The court in *MacNamara* reconciled Title VII, the ADEA and the FCN Treaty and held that although a Korean company would be permitted to hire a Korean citizen over a United States citizen, the "of their choice" language contained in the Treaty did not excuse foreign employers from the reach of the United States antidiscrimination statutes, which prohibit intentional discrimination based on race, religion, sex, national origin and age.<sup>11</sup>

This Comment examines the conflict between the United States statutes and the FCN Treaty, and proposes some possible resolutions. It begins with a brief history of Title VII, the ADEA, and the FCN Treaty. Against this background, *MacNamara v. Korean Air Lines* is discussed in an attempt to reconcile previous decisions with domestic and international law and policy. Finally this Comment concludes by suggesting that guidelines be implemented to ensure that statutes are not enacted when the proposed statute would create a conflict with an existing international obligation. Congress should be required to amend existing international agreements if they conflict with proposed statutes prior to the enactment of such statutes. Furthermore, in light of the Supreme Court's refusal to hear the appeal in the *MacNamara* case, Congress should clarify its intent and amend conflicting statutes or international obligations whenever possible.

## II. TITLE VII, THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND THE FRIENDSHIP, COMMERCE AND NAVIGATION TREATY

The Civil Rights Act of 1964<sup>12</sup> was the product of many prior attempts to enact an all-encompassing antidiscrimination statute. On February 28, 1963, President John F. Kennedy stated in a message to Congress that Title VII espoused the principle that "no man should be denied employment commensurate with his abilities because of his race or creed or ancestry."<sup>13</sup> In addition to President Kennedy's support, many groups

---

10. 863 F.2d 1135 (3d Cir. 1988).

11. *MacNamara*, 863 F.2d at 1136.

12. Title VII, 42 U.S.C. § 2000e (1990).

13. 109 CONG. REC. 3248 (1963); see also Comment, *Japanese Employers and Title*

such as the National Association for the Advancement of Colored People demanded federal legislation prohibiting discrimination in the workplace.<sup>14</sup> Congress responded to this pressure by enacting the Civil Rights Act of 1964, aimed at guaranteeing all persons equal protection from employment related discrimination.<sup>15</sup> Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of "race, color, religion, sex or national origin."<sup>16</sup> While the primary objective at the time of the enactment of Title VII was to eliminate discrimination against blacks, the Supreme Court has noted that "[t]he objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."<sup>17</sup> The language of Title VII does not explicitly exempt foreign corporations employing United States citizens either inside or outside of the United States.<sup>18</sup>

As a result of Title VII's failure to include age-related discrimination, the ADEA<sup>19</sup> was enacted as an attempt by Congress to fill the void left by Title VII. The ADEA prohibits age-related employment discrimination against persons age forty and over.<sup>20</sup>

VII: *Sumitomo Shoji America, Inc. v. Avigliano*, 15 N.Y.U.J. INT'L L. POL. 653, 666 (1983) [hereinafter *Japanese Employers and Title VII*].

14. *Japanese Employers and Title VII*, *supra* note 13, at 667.

15. *See infra* note 16.

16. Title VII, 42 U.S.C. § 2000e-2 (1990). The text of Title VII states in pertinent part:

It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin.

*Id.* (emphasis added).

17. *Griggs v. Duke Power Company*, 401 U.S. 427, 429-30 (1971).

18. *Street, Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U.J. INT'L L. POL. 357 (1987).

19. 29 U.S.C. § 631(a) (1982).

20. 29 U.S.C. § 631(a) (1982), as amended by Pub. L. No. 99-592, § 2(c)(1) (1986).

The text of the ADEA states in pertinent part that:

It shall be unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age;  
 (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's age; or  
 (3) to reduce the wage rate of any employee in order to comply with this

The ADEA covers private employers of twenty or more workers and all federal agencies. It states that its purpose is "to promote employment of older workers based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."<sup>21</sup> The general application and terms of the statute are similar to those in Title VII.<sup>22</sup> The statute provides that "if an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer."<sup>23</sup> Therefore, a United States corporation operating in a foreign country would be covered by the statute. However, there is no mention of coverage of foreign corporations that operate in the United States.

The FCN Treaty<sup>24</sup> between the United States and the Republic of Korea was intended to promote and secure foreign investment.<sup>25</sup> The purpose of the Treaty was to increase foreign investment and allay the fears of such investors concerning their ability to control their companies without interference.<sup>26</sup> The Treaty permits nationals of either party to enter the territories of the other party to carry on trade and engage in other activity related to their investments.<sup>27</sup> The Treaty further grants the right of a national of either party to travel freely within the territory of the other party and guarantees such parties fair treatment and safety.<sup>28</sup> Additionally, the property of the nationals of

---

chapter.

*Id.* at § 623.

21. 29 U.S.C. § 621 (1990).

22. 29 U.S.C. § 206 (1988).

23. 29 U.S.C. § 623 (1990).

24. FCN Treaty, *supra* note 5. The Treaty, in Article VIII(1), states in pertinent part that:

1. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, *executive personnel*, attorneys, agents and other specialists of their choice.

*Id.* at art. VIII(1) (emphasis added).

25. Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AMER. J. COMP. L. 229, 230 (1956) [hereinafter Walker, *Treaties*].

26. Walker, *Treaties*, *supra* note 25, at 30.

27. FCN Treaty, *supra* note 5.

28. FCN Treaty, *supra* note 5.

a party to the Treaty will be protected.<sup>29</sup>

The legislative history of the FCN Treaty seems to suggest that both parties felt that the right of employers to hire their own nationals in high-level positions was vital to the success of foreign investment.<sup>30</sup> Thus, a clause was included in the Treaty that permits Korean corporations to engage executive personnel "of their choice."<sup>31</sup> This clause appears on its face to condone discriminatory practices in the selection of employees, in direct conflict with the anti-discriminatory thrust of Title VII and the ADEA.<sup>32</sup> Although the FCN Treaty seems to allow an absolute right to Korean companies to engage employees of their choice, whether such choice is premised on a discriminatory basis or not,<sup>33</sup> the antidiscrimination statutes generally prohibit any discriminatory practices in the workplace.<sup>34</sup>

### III. *MACNAMARA V. KOREAN AIR LINES*

#### A. *Background*

Thomas MacNamara, a fifty-seven-year-old caucasian United States citizen, began working for Korean Air Lines (KAL), a Korean corporation, in 1974. His employment was terminated on June 15, 1982.<sup>35</sup> While employed by KAL, he had been promoted from salesman to district sales manager for Delaware, Pennsylvania, and southern New Jersey.<sup>36</sup> As a result of a KAL restructuring program, MacNamara was fired and replaced by Wan Gin Chung, a forty-two-year-old Korean citizen.<sup>37</sup>

After exhausting his administrative remedies, MacNamara brought an action against KAL, alleging *inter alia*,<sup>38</sup> violations

---

29. FCN Treaty, *supra* note 5.

30. The legislative history is similar for other Friendship, Commerce, and Navigation treaties with other nations as well. *See* Hearing Before a Subcomm. of the Comm. on Foreign Relations of the U.S. Senate on Treaties of Friendship, Commerce, and Navigation Between the United States and Columbia, Israel, Ethiopia, Italy, Denmark, and Greece, 82d Cong., 2d Sess. 26 (1952). *See also* Wickes v. Olympic Airlines, 745 F.2d 363, 367-68 (6th Cir. 1984).

31. FCN Treaty, *supra* note 5, at art. VIII(1).

32. *See supra* notes 15-23 and accompanying text.

33. The FCN Treaty seems to grant a broad right to hire employees of the foreign employer's choice, regardless of the intent of such acts. *See* FCN Treaty, *supra* note 5.

34. *See supra* notes 15-23 and accompanying text.

35. *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988).

36. *Id.*

37. *MacNamara v. Korean Air Lines*, 45 Fair Empl. Prac. Cas. (BNA) 384 (E.D. Pa. 1987).

38. MacNamara also alleged that as a result of his termination, he was deprived of

of both Title VII and the ADEA. MacNamara's complaint claimed that the decision to replace him was based primarily on his national origin and age, in violation of both Title VII and ADEA.<sup>39</sup> The complaint stated that "all of [KAL's] American Sales Managers in the United States were replaced by Koreans."<sup>40</sup> MacNamara further alleged that when enacting Title VII and the ADEA, Congress impliedly repealed the Treaty exemption and, therefore, KAL is bound by Title VII and the ADEA.<sup>41</sup> In a motion to dismiss, KAL claimed that under the terms of Article VIII(1) of the FCN Treaty, a Korean Corporation is permitted to "engage . . . executive personnel . . . of their choice,"<sup>42</sup> and thus, it was exempt from the prohibitions of Title VII and the ADEA.<sup>43</sup>

### B. District Court Decision

The district court, ruling on KAL's motion to dismiss, granted summary judgment in favor of KAL and held that there was a direct conflict between the United States statutes, Title VII and the ADEA, and Article VIII(1) of the FCN Treaty.<sup>44</sup> The court held that based on the history and construction of the FCN Treaty, there was no clear showing of congressional intent to override the Treaty.<sup>45</sup> Since the court found no intent and since a valid reconciliation between Title VII and the ADEA and the Treaty was not possible, the court concluded that the Treaty must take precedence over Title VII.<sup>46</sup>

The district court discussed the history of the FCN Treaty

---

benefits due to him under the Korean Air Lines pension plan, and that such deprivation violated the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104(a)(1) (1982). As such, MacNamara went to the various governmental agencies and filed a complaint prior to instituting this action. This type of action generally requires that the injured party exhaust all administrative remedies prior to the filing of an action. *MacNamara*, 863 F.2d at 1138.

39. *Id.*

40. *Id.*

41. *MacNamara*, 45 Fair Empl. Prac. Cas. (BNA) at 384. MacNamara also argued that he was not an "executive" under the terms of the Treaty. In the alternative, he argued that the term "engage," used in the Treaty, does not encompass the right to terminate an executive employee. *Id.*

42. *Id.* at 384 (citing the FCN Treaty, *supra* note 5).

43. *Id.* at 391.

44. *Id.* at 385.

45. *Id.*

46. The court stated that to hold that Title VII superceded the Treaty would "go beyond the judicial sphere of interpretation." *Id.* at 391.



and the specific nature of such treaties in an attempt to analyze the intent of the parties and reconcile the Treaty with the antidiscrimination statutes.<sup>47</sup> The court noted that the statutes may only prevent the assertion of the "of their choice" exception<sup>48</sup> if there was a showing of intent on the part of the United States Congress to override the Treaty by the passage of the statutes.<sup>49</sup>

The district court then analyzed the FCN Treaty's various standards of treatment of foreign corporations.<sup>50</sup> The court interpreted Article VIII(1) of the FCN Treaty as an "absolute" rule, which grants greater rights to foreign companies than those afforded to domestic companies.<sup>51</sup>

The district court then explained that its role in interpreting treaties was to "giv[e] effect to the intent of the treaty parties."<sup>52</sup> Only when Congress clearly intends to depart from the United States Treaty obligation may the court find such a departure.<sup>53</sup> The court found no such intent and held that Title VII did not override the FCN Treaty.<sup>54</sup> Based on the general FCN Treaty history, the court inferred from the "of their choice" language of Article VIII(1)<sup>55</sup> that the intent of the United States and the Republic of Korea was to exempt from

---

47. *Id.* at 385-86.

48. FCN Treaty, *supra* note 5.

49. *MacNamara*, 45 Fair Empl. Prac. Cas. (BNA) at 386. The court stated that absent a clear intention by Congress to override the treaty obligations, the court must attempt to reconcile the statute and the treaty. *Id.* Furthermore, the court noted that the FCN Treaty between the United States and the Republic of Korea was one of many such treaties adopted by Congress after World War II. Contrary to pre-FCN Treaty agreements, which merely gave legal status to corporations operating in a foreign country and access to foreign courts, the FCN Treaties were intended to allow United States corporations to conduct business in other countries and allow foreign corporations to conduct business within the United States. The court also noted that these treaties were not political in nature, but rather, they were fundamentally economic and legal in nature. *Id.* at 385-86.

50. *Id.* These standards of treatment are: (1) "national treatment," which affords foreign corporations the same treatment as domestic corporations; (2) "most favored nation treatment," which means that a foreign company in the host country is afforded the same treatment as a company of any third country in similar circumstances; and (3) "absolute" rules in treaties, which grant foreign companies greater rights and freedoms than those afforded to domestic companies. *Id.*

51. *Id.* at 386-87.

52. *Id.* at 386. (Quoting *Sumitomo Shoji America, Inc. v. Avigiano*, 457 U.S. 176, 185 (1982)).

53. *Id.*

54. *Id.* at 387.

55. *Id.* (citing FCN Treaty, *supra* note 5).

the impact of the host countries' domestic laws, those employees who are directly involved with policy-making, those charged with the administration of such policy, and those with essential technical skills.<sup>56</sup>

The court noted that in other FCN treaties, the United States had insisted on language that either limited the "of their choice" exception or made it conditional on other factors.<sup>57</sup> Thus, it is apparent that Congress had no such intent regarding this Treaty as a result of the United States' inclusion of such provisions in similar treaties and the clear absence of such language here.<sup>58</sup> Therefore, the court concluded that the Treaty is "clear on its face"<sup>59</sup> and no such intent is present in this case.<sup>60</sup>

In a further attempt to reconcile the Treaty with Title VII and the ADEA, the court confronted MacNamara's argument that he was not an "executive employee" under the terms of the Treaty. Since the Treaty states that foreign corporations may hire "executive employees of their choice," if MacNamara was not an executive employee, the Treaty would fail to protect KAL from the restrictions of Title VII and the ADEA.<sup>61</sup> However, the district court had very little difficulty in finding that MacNamara was in fact an "executive employee" under the terms of the exception clause of Article VIII(1).<sup>62</sup> Thus, as an executive employee under the terms of the treaty exemption, KAL could replace him with an "executive employee of [its] choice."<sup>63</sup>

The court rejected the theory that the Bona Fide Occupational Qualification (BFOQ) exception of Title VII was a valid tool for such a reconciliation of the Treaty with the statute.<sup>64</sup>

---

56. *Id.*

57. *Id.* The court cited as examples a similar treaty between the United States and Uruguay, in which the United States negotiated language in the treaty to deal with domestic law restrictions, and a treaty with Pakistan, which included the clause "[n]ationals and companies of either party shall be permitted, *in accordance with the applicable laws . . .*" *Id.* (emphasis added).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 388-89. The court reasoned that MacNamara's position as the district sales manager was of great importance and included supervisory and managerial responsibilities. *Id.*

63. *Id.* at 389-90.

64. *Id.* at 391. The Bona Fide Occupational Qualification exception (BFOQ) to Title VII states:

Notwithstanding any other provision of this title, (1) it shall not be an unlaw-

The BFOQ exception exempts employees with specific qualifications needed to perform a particular job from Title VII protection. It allows employers to hire such persons if they meet the requirements of the BFOQ exception.<sup>65</sup> The court stated that the application of the BFOQ exception "would require a court or jury to resolve broad issues beyond those that Congress intended to place before the courts."<sup>66</sup> Thus, the court concluded that the application of the BFOQ exception with regard to the "of their choice" exemption would expand the narrow scope of the BFOQ exception intended by Congress and could not be applied here.<sup>67</sup>

Following the district court's decision granting summary judgment, MacNamara appealed to the United States Court of Appeals for the Third Circuit.

### C. Court of Appeals Decision

The court of appeals reversed the district court's decision and held that a reconciliation of Title VII, the ADEA and the FCN Treaty was possible and additionally that the "of their choice" language contained in the Treaty did not excuse foreign employers from the reach of the United States antidiscrimination statutes, which prohibit intentional discrimination based on race, religion, sex, national origin and age.<sup>68</sup> Consistent with its holding, the court remanded the case to the district court for further proceedings and a determination as to whether KAL had intentionally discriminated based on race, national origin or age, rather than based on citizenship alone.<sup>69</sup> The court of appeals

---

ful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Title VII, 42 U.S.C. § 2000e-2(e)(1).

65. *Id.*

66. *MacNamara*, 45 Fair Empl. Prac. Cas. (BNA) at 391.

67. *Id.*

68. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1147 (3d Cir. 1988). The Court of Appeals reversed and remanded the case for further proceedings consistent with its opinion. The court held that MacNamara's claim was valid and should not have been disposed of summarily. *Id.* at 1149.

69. *Id.*

noted that with respect to age discrimination, a foreign corporation could not, for example, intentionally set out to reduce the average age of its work force.<sup>70</sup> However, the court did perceive a potential conflict between the FCN Treaty and Title VII regarding an employer's hiring decision based solely on the employee's citizenship, race or other basis prohibited by Title VII.<sup>71</sup>

The court then discussed the outcomes of similar cases in other circuits in an attempt to display the varying analyses and outcomes. The court distinguished a Fifth Circuit decision, *Spiess v. C. Itoh & Co. (America)*,<sup>72</sup> in which the Fifth Circuit held that Title VII did not protect United States employees of a wholly-owned New York subsidiary of a Japanese company from discrimination by the employer.<sup>73</sup> The *Spiess* court based its opinion on a United States-Japanese FCN Treaty provision that is nearly identical to Article VIII(1) of the United States-Korean FCN Treaty.<sup>74</sup> The court of appeals stated that the *Spiess* decision, which is consistent with the district court decision in *MacNamara*, was incorrect and that the Fifth Circuit was the only one of the three appellate courts to have considered this issue to hold that a treaty totally insulates a foreign corporation from domestic statutes.<sup>75</sup>

The court of appeals then addressed another similar case in which the Second Circuit stated that the intent of a virtually identical clause in a Japanese FCN Treaty was to broadly apply the BFOQ exception.<sup>76</sup> In *Avigliano v. Sumitomo Shoji America, Inc.*,<sup>77</sup> the court held that based on the BFOQ exception, there was no conflict between Title VII and the FCN Treaty.<sup>78</sup> Consequently, the *Avigliano* court merely required the

---

70. *Id.*

71. *Id.*

72. 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128, (1982) (*Spiess* deals with United States employees of a wholly-owned New York subsidiary of a Japanese company who claimed that their employer only gave promotions to Japanese citizens).

73. *Spiess*, 643 F.2d at 353-72.

74. *Spiess*, 643 F.2d at 355.

75. *MacNamara*, 863 F.2d at 1139-40.

76. *See Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552, 559 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

77. *See Avigliano* 638 F.2d 552. In this case, secretaries brought a class action against a wholly-owned subsidiary of a Japanese corporation, alleging that the corporation had a discriminatory policy of filling its management-level positions exclusively with male Japanese nationals. *Id.* at 554.

78. *Id.* at 559.

foreign company to justify its act under the BFOQ exception.<sup>79</sup> The *Avigliano* court, however, stated that the Treaty was not intended to give foreign corporations greater rights than domestic corporations.<sup>80</sup> Like the *Avigliano* court, the *MacNamara* court reasoned that the purpose of the Korean FCN Treaty was not to grant greater rights to the foreign corporations, but rather to protect foreign citizens from being discriminated against on the basis of their nationality.<sup>81</sup>

The Third Circuit then noted the Sixth Circuit decision in *Wickes v. Olympic Airways*<sup>82</sup> which held that there was no conflict between Title VII and the FCN Treaty because the Treaty permitted the hiring of Greek citizens and the statute did not proscribe employment decisions on the basis of citizenship.<sup>83</sup> The Third Circuit agreed with the *Wickes* decision, stating that Article VIII(1) of the FCN Treaty was targeted at domestic legislation that discriminated on the basis of citizenship and that the Treaty's purpose was to ensure that foreign investors would not be barred from placing their own citizens in managerial positions.<sup>84</sup>

The court of appeals in *MacNamara* also stated that it agreed with KAL regarding MacNamara's "executive" status. The court concluded that MacNamara was in fact an executive employee under the treaty exception, due to his managerial role and high-level status within the company.<sup>85</sup> The court disagreed with KAL's argument that the term "to engage foreign nationals" included the right to replace persons such as MacNamara with a foreigner.<sup>86</sup> The court stated that KAL did not offer any persuasive evidence that the purpose of the "of their choice" clause was to permit an exemption from laws prohibiting discrimination on the basis of race, national origin, or age discrimination.<sup>87</sup> The court noted that the holding of the district court would create a reverse discrimination effect, thus granting for-

---

79. *Id.*

80. *Id.*

81. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1146 (3d Cir. 1988).

82. 745 F.2d 363 (6th Cir. 1984).

83. *Wickes* involved a corporation owned by the government of the Republic of Greece that allegedly fired an employee in the United States based on his age and national origin. *Id.* at 363-64.

84. *MacNamara*, 863 F.2d at 1144-45.

85. *Id.* at 1141.

86. *Id.*

87. *Id.* at 1145.

eign corporations greater rights than those afforded to domestic corporations.<sup>88</sup>

The court of appeals in *MacNamara* also relied on a United States Department of State (State Department) interpretation of the Treaty, noting that the Supreme Court case of *Kolovrat v. Oregon*<sup>89</sup> held that such State Department interpretations must be given great weight.<sup>90</sup> According to the State Department, Article VIII(1) was intended to create a limited privilege to hire noncitizens and was not intended to create a general exemption from antidiscrimination laws.<sup>91</sup>

With regard to Congressional intent to override the treaty provision, the court of appeals agreed with KAL's argument that absent such intent, the Treaty must prevail in the face of a direct conflict between Title VII and the FCN Treaty.<sup>92</sup> The court then stated that it did not perceive a conflict between the Treaty and Title VII and the ADEA.<sup>93</sup> In support of this assertion, the court argued that Title VII and the ADEA deal with intentional discrimination on the basis of race, national origin and age, while the Treaty is intended to allow foreign corporations an opportunity to hire noncitizens.<sup>94</sup> The court also discussed the difference between the term "national" and the term "citizen,"<sup>95</sup> concluding that Title VII only prohibits discrimination based on nationality and not discrimination based on citizenship.<sup>96</sup> The court reasoned that exempting foreign corporations from Title VII would give the foreign corporations an

---

88. *Id.* The court of appeals did not interpret the treaty clause as being an absolute standard of treatment as the district court did. See *supra* note 50.

89. 366 U.S. 187 (1961).

90. *MacNamara*, 863 F.2d at 1146. In *Kolovrat*, the Supreme Court stated that while it is the court's function to interpret the treaties, great deference must be given to the interpretations of the governmental departments charged with their negotiations and enforcement. *Kolovrat*, 366 U.S. at 194.

91. *MacNamara*, 863 F.2d at 1146.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1147. Citizens are defined as persons born or naturalized in the United States who have "established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights." *United States v. Cruikshank*, 92 U.S. 542, 549 (1875). See also, U.S. Const. amend. XIV. "Nationality" is defined as that quality or character which arises from the fact that a person belongs to a nation; nationality determines the political status of the individual, especially with reference to allegiance. *Brassett v. Bidle*, 59 F. Supp. 457, 462 (D. Conn. 1944).

96. *MacNamara*, 863 F.2d at 1140-41.

unfair advantage over domestic corporations, which would remain bound by the statute.<sup>97</sup>

The court saw no logical or theoretical conflict between the Treaty, which allows a foreign corporation to hire its own citizens as managers, and Title VII or the ADEA, which prohibit intentional discrimination on a basis of race, age, and national origin.<sup>98</sup> Thus, in the absence of a conflict, the court concluded that Title VII and the ADEA remain in full force and effect, regardless of the FCN Treaty in this case and, therefore, KAL may not intentionally discriminate on the basis of race, national origin, or age.<sup>99</sup>

#### IV. APPROACHES TO THE CONFLICT: RECONCILIATION, DOMESTIC LAW AND INTERNATIONAL LAW

The issues raised by the *MacNamara* decision display the intricate and frequently conflicting relationship between laws of the United States and international law or United States bilateral treaty law.<sup>100</sup> Thus, there may be varying outcomes to the conflict in *MacNamara*, depending on which body of law is applied.

The general rule under both domestic and international law is that, in the face of a conflict between a domestic statute and an international agreement, the court should attempt to reconcile the United States statute with the international agreement.<sup>101</sup> However, if such a reconciliation is not possible, the outcome of the conflict may differ under domestic and international law.<sup>102</sup> Under domestic law, when a conflict arises between an act of Congress and an international treaty, the later in time will prevail.<sup>103</sup> However, under international law, the United States remains bound by the treaty or international agreement and the subsequent statute does not relieve the United States from its obligation.<sup>104</sup> Thus, under international law, the international agreement should prevail even if the statute was en-

---

97. *Id.*

98. *Id.*

99. *Id.* at 1146.

100. *Id.* at 1135-49.

101. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 114 [hereinafter RESTATEMENT (THIRD)].

102. See *infra* notes 107-15 and accompanying text.

103. RESTATEMENT (THIRD), *supra* note 101, at § 115.

104. RESTATEMENT (THIRD), *supra* note 101, at § 115.

acted at a later date.

In the face of a conflict between a statute and an international agreement, an attempt must be made to reconcile the statute with the international agreement. The Supreme Court has stated that under such circumstances "the court[s] will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either."<sup>105</sup> This general principle dates back to the year 1804, when Chief Justice John Marshall stated that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>106</sup>

If a reconciliation of the statute and the treaty is not possible, it is unclear which takes precedence. Under the Constitution of the United States, Article VI, section 2, all laws of the United States and all treaties made under the authority of the United States are "the supreme law of the land."<sup>107</sup> Therefore, it seems that there is nothing in the Constitution that gives one superiority over the other. A treaty is the law of the land, as is a statute passed by Congress.<sup>108</sup> Thus, an ambiguity remains as to which takes priority in the face of a clear conflict between these forces of law.

The general rule of domestic law is that in the face of a clear conflict between a treaty and a subsequent statute, the subsequent statute take precedence over the treaty.<sup>109</sup> This ex-

105. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). This case dealt with a conflict between a statute and treaty regarding the imposition of an import tax. The court held that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty. See also *RESTATEMENT (THIRD)*, *supra* note 101, at § 114, which states: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." *Id.*

106. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Also cited by *RESTATEMENT (THIRD)*, *supra* note 101, at § 114, reporter's notes.

107. "This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof; and *all Treaties* made, or which shall be made, under the authority of the United States, *shall be the supreme Law of the Land.*" U.S. CONST. art. VI (emphasis added).

108. *Edye v. Robertson*, 112 U.S. 580, 598, 599 (1884). See also *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889). ("[Both treaties and statutes] are declared to be the supreme law of the land and no paramount authority is given to one over the other."); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (The Supreme Court held that both are the "supreme law of the land" and "no superior efficacy is given to either over the other.")

109. *RESTATEMENT (THIRD)*, *supra* note 101, at § 115(a)(1).

[A]n act of Congress supersedes an earlier . . . provision of an international agreement as the law of the United States . . . if the act and the earlier rule or



ception to the supremacy rule was set forth by the Supreme Court as early as the nineteenth century<sup>110</sup> when it held that "if there be any conflict between the stipulations of the treaty and the requirements of the law the latter must control."<sup>111</sup> The Supreme Court has further held that "when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous Treaty . . ."<sup>112</sup> The Supreme Court has stated that the court's duty is limited to giving effect to the latest expression of the sovereign will.<sup>113</sup>

Contrary to the domestic rule of law, the general rule of international law is that the United States is not automatically relieved of its international obligation or of the consequences of a violation of that obligation by the mere enactment of a statute that is contrary to the international obligation.<sup>114</sup> A treaty is primarily a contract between independent nations and it depends on the parties for enforcement.<sup>115</sup> If a party to a bilateral treaty feels that the other party has violated the treaty, "it may present its complaint to the executive head of the [other] government, and take [any] measures as it may deem essential for the protection of its interests."<sup>116</sup> While the injured parties may seek redress through international law avenues,<sup>117</sup> the courts within the United States nevertheless remain bound by the domestic law stated above.<sup>118</sup> Thus, while a court within the United States must apply the domestic rule of law, and hold that the later in time prevails, the United States remains bound by its international obligation under the international rule of law.

---

provision cannot be fairly reconciled.

*Id.* See also *Edye*, 112 U.S. 580; *Whitney*, 124 U.S. 190; *Chae Chan Ping*, 130 U.S. 581.

110. See *Edye*, 112 U.S. at 599; *Whitney*, 124 U.S. at 194; *Chae Chan Ping*, 130 U.S. at 600.

111. *Whitney*, 124 U.S. at 194. See also, *Edye*, 112 U.S. at 599; *Chae Chan Ping*, 130 U.S. at 600.

112. *Whitney*, 124 U.S. at 194.

113. *Id.*

114. RESTATEMENT (THIRD), *supra* note 101, at § 115(b).

115. *Edye*, 112 U.S. at 598.

116. *Whitney*, 124 U.S. at 194.

117. For example, one may demand that the offending party cease such activity and if they refuse they may take the offending party to an international tribunal. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW, CASES AND MATERIALS* 480-85 (2d ed. 1987).

118. Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524, 527 (1987). See *infra* note 154 and accompanying text.

## V. DISCUSSION

The court of appeals decision in *MacNamara* is absolutely correct under the laws of the United States, although under the international rule of law the district court's logic is also not without some merit. The domestic rule of law is quite clear: in the face of a conflict, the later in time prevails. The district court would only be correct if it were a court of international jurisdiction, which it is not.

When faced with a potential conflict between a statute and a treaty, a United States court must first attempt to reconcile them. There are three possible approaches to reconcile the FCN Treaty with Title VII and the ADEA. The first approach looks at the purpose behind the FCN Treaty, Title VII, and the ADEA.<sup>119</sup> The second approach deals with the difference between the term "nationality" and the term "citizen."<sup>120</sup> Since Title VII prohibits discrimination on the basis of nationality and the FCN Treaty deals with conflicts based on citizenship, the two may be reconciled. The final approach deals with the possible reconciliation under the terms of the BFOQ exemption of Title VII.<sup>121</sup>

A reconciliation between the FCN Treaty and the ADEA may be possible in *MacNamara*, based on the different purposes behind the FCN Treaty, Title VII, and the ADEA.<sup>122</sup> As the court of appeals stated in *MacNamara*, Title VII and the ADEA were intended to prohibit intentional discrimination.<sup>123</sup> The purpose of the treaty exemption was not to permit Korean corporations to intentionally discriminate, but rather to assure Korean corporations the right to have their businesses managed by their own nationals within the host country.<sup>124</sup> KAL intentionally set out to replace its non-Korean managers with those who were Korean, regardless of the non-Korean manager's ability to do the job.<sup>125</sup> Thus, since KAL's act was an intentional act of dis-

---

119. See *infra* notes 122-32 and accompanying text.

120. See *infra* notes 133-39 and accompanying text.

121. See *infra* notes 140-43 and accompanying text.

122. If the purposes of the statute and the treaty are not the same they may not be in direct conflict and may be reconciled.

123. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1141 (3d Cir. 1988). See also Note, *Title VII: Application of Impact Analysis to Subjective Employment Criteria — Watson v. Fort Worth Bank and Trust*, 24 HARV. C.R.-C.L. REV. 264, 269 (1989).

124. See *MacNamara*, 863 F.2d at 1144-45.

125. See *supra* note 37 and accompanying text.

crimination, the treaty exception is inapplicable to the situation in *MacNamara*. Similarly, the Supreme Court has held that the purpose of Title VII and the ADEA was different than that of a similar FCN treaty.<sup>126</sup> The Supreme Court stated that the purpose of an FCN Treaty, which contains a clause identical to Article VIII(1), was not to give foreign corporations greater rights than domestic companies, but rather to guarantee them the opportunity to conduct business on an equal basis with domestic companies without suffering discrimination based on nationality.<sup>127</sup> FCN treaties were intended to promote hospitality and assure foreign companies "equal protection of the laws alike with the citizens of the [host] country."<sup>128</sup> The circumstances surrounding the enactment of the Treaty are a further indication of its nondiscriminatory intent. When the Senate was considering the FCN treaties, nine states had antidiscrimination statutes regarding employment,<sup>129</sup> yet, during the testimony given on the proposed FCN Treaty with the Republic of Korea, a State Department representative testified that the Treaty contained nothing that would affect the law of any state.<sup>130</sup>

Although these arguments have validity, a number of counter-arguments may be offered. Since the Treaty seems on its face to give corporations a broad right to hire executives of their choice, an argument can be made that such a right should include the right to intentionally discriminate in choosing such executives. The Treaty seems to grant foreign corporations the right to select executive personnel "of their choice" without any regard to the underlying intent of such action.<sup>131</sup> There is no

---

126. See *supra* note 77. In *Sumitomo Shoji America, Inc. v. Avigliano*, 457 U.S. 176 (1982), the Supreme Court discussed the purpose of an FCN Treaty between the United States and Japan. That treaty contains a clause identical to Article VIII(1) of the FCN Treaty.

127. *Id.* at 187-88. See also Brief in opposition of Plaintiff-Respondent of *Thomas v. MacNamara* at 7, *MacNamara v. Korean Air Lines*, 863 F.2d at 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989) (No. 88-1449).

128. Walker, *Treaties*, *supra* note 25, at 230.

129. *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 951 (1979). See also Cross-Petition for a Writ of Certiorari to the Supreme Court of Appeals for the Third Circuit at 8, *MacNamara v. Korean Air Lines*, 863 F.2d at 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989) (No. 88-1449).

130. Sen. Ex. Rep. No. 5, 85th Cong., 1st Sess. July 1, 1956 (1957), at 13-14. See also Cross-Petition for a Writ of Certiorari to the Supreme Court of Appeals for the Third Circuit at 8, *MacNamara v. Korean Air Lines*, 863 F.2d at 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989) (No. 88-1449).

131. FCN Treaty, *supra* note 5.

language which states, either expressly or impliedly, that such selection of executive employees must be made in a nondiscriminatory manner. Therefore, with regard to the argument that the Treaty does not excuse the act of intentional discrimination, the intent of KAL should be irrelevant in *MacNamara*, because the Treaty does not appear to put any limits on the foreign corporation's right to engage executive employees of its choice.<sup>132</sup>

Under the second reconciliation approach,<sup>133</sup> it can be argued that the FCN Treaty does not include the same type of discrimination prohibited by Title VII and the ADEA. For example, the prohibition against discrimination on the basis of nationality is not the same as the form of discrimination in this case, which is on the basis of citizenship.<sup>134</sup> This was the approach followed by the *Wickes* court.<sup>135</sup> The *Wickes* court held that there was no conflict between a United States-Greek FCN Treaty and Title VII because the Treaty permitted the hiring of Greek citizens and Title VII does not proscribe discrimination on the basis of one's citizenship.<sup>136</sup> This theory, however, has no basis in law. The term "nationality" is a term denoting a relationship between an individual and a nation involving a duty of obedience or allegiance by the subject and protection by the state.<sup>137</sup> Similarly, the term "citizen" is defined in the United States as "[a person] born or naturalized in the United States."<sup>138</sup> Assuming KAL fired MacNamara because he was a citizen of the United States and not a Korean, the outcome would be the same under both of these definitions. Because MacNamara was naturalized within the United States, and was a citizen of, and owed allegiance to that nation, instead of Korea, KAL chose to replace him with a Korean employee.<sup>139</sup> Such an action or attitude is discriminatory under either definition, and absent the Treaty, Title VII and the ADEA would unquestionably apply.

The third argument reconciling the FCN Treaty with Title VII is that although KAL's actions were discriminatory, the ac-

---

132. FCN Treaty, *supra* note 5.

133. See *MacNamara v. Korean Air Lines*, 863 F.2d at 1146-47.

134. See *id.*

135. *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984).

136. *Wickes*, 745 F.2d at 363.

137. *Cabebe v. Acheson*, 183 F.2d 795, 797 (9th Cir. 1950).

138. U.S. CONST. amend. XIV.

139. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1140 (3d Cir. 1988).

tions fell under Title VII's BFOQ exception.<sup>140</sup> The BFOQ exception states that if a job can only be done by a particular type of person, the employer may intentionally choose such an employee over another, even if such a selection is based on the race, sex, or nationality of that party.<sup>141</sup> The *Avigliano* court used this approach, holding that there was no conflict between the FCN Treaty and Title VII based on the BFOQ exception.<sup>142</sup> This argument is not persuasive in *MacNamara*, however, because *MacNamara* was able to perform the duties of his position for a number of years prior to his termination and the job had not changed to merit the sudden need of a better qualified replacement.<sup>143</sup> Therefore, it appears that the BFOQ exception is inapplicable to this case.

If a reconciliation is not possible, the conflict remains. Under the domestic law approach, the statutes will take precedence over the FCN Treaty since the Treaty was ratified in 1956 and both Title VII, passed in 1964, and the ADEA, passed in 1967, were enacted after the Treaty.<sup>144</sup> The court of appeals decision that the antidiscrimination statutes prevail over the Treaty because the statutes were the later in time is absolutely correct under the law of the United States, which states that the later in time will prevail.<sup>145</sup> Consequently, *MacNamara* should have a valid claim under the antidiscrimination statutes and the Treaty exemption is not a valid defense to *MacNamara's* claim.

Under international law, however, the Treaty may continue to grant the exemption to KAL even though the courts of the United States are obligated to apply the law consistently with the domestic law stated above.<sup>146</sup> The district court seems to have followed an approach that would be better placed in an international court, which would be bound by the international rule of law.<sup>147</sup> The district court focused on the intent of Congress to determine if Congress had expressly or impliedly disavowed its treaty obligation by passing Title VII or the ADEA. Disavowal of the treaty obligation would allow the statutes to

---

140. Title VII, 42 U.S.C. § 2000e-2(e)(1).

141. For definition of BFOQ, see *supra* note 64.

142. *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552, 559 (2d Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

143. *MacNamara*, 863 F.2d at 1135-49.

144. See *supra* note 103.

145. See *supra* note 103.

146. See *supra* note 114.

147. W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW*, 249-63 (1988).

prevail under international law as well as under domestic law.<sup>148</sup> Since Congress has the power to terminate or amend treaties,<sup>149</sup> amendment or termination of the FCN Treaty through the enactment of Title VII or the ADEA would remove any United States obligation under the Treaty. Since the district court found no intent to amend or terminate the United States obligation under the FCN Treaty, it held that the United States remains bound by the terms of the Treaty.<sup>150</sup> Although this holding may be proper under the rules of international law, the district court's holding was incorrect under the domestic laws of the United States by which it is bound.<sup>151</sup>

Finally, there are three policy arguments regarding the conflict between the FCN Treaty and Title VII and the ADEA. The first policy argument deals with the importance of complying with the intent of the legislature when enacting either the FCN Treaty or Title VII and the ADEA. The second policy argument deals with the ramifications of the United States' nullifying an international agreement on future foreign relations. The final policy argument confronts the unfair advantage that a foreign corporation would receive if it was not bound by the same antidiscrimination statutes as domestic corporations.

It is important for courts to give full force and effect to the intent of the parties to a treaty, as well as the intent of the legislature in enacting the statutes. The Supreme Court has noted that the court's role is limited to giving effect to the intent of the parties to the Treaty.<sup>152</sup> The primary purpose of Article VIII(1) of the FCN Treaty was to ensure the right of foreign corporations to employ their nationals if they so desired, thus placing the foreign corporation on an equal footing with the domestic companies.<sup>153</sup> Furthermore, the primary purpose of the antidiscrimination statutes was to eliminate discriminatory and preferential treatment, thus allowing equal employment opportunities to all employees. Therefore, to allow the foreign corporations to exercise their rights under the "of their choice" ex-

---

148. See *supra* note 101.

149. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 167-71 (1972) [hereinafter HENKIN].

150. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1140 (3d Cir. 1988).

151. See *supra* note 118.

152. *Avigliano v. Sumitomo Shoji America, Inc.*, 457 U.S. 176, 185 (1982).

153. See Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L. L. 373, 386 (1956); see also Walker, *Treaties*, *supra* note 25, at 234.

emption would in effect totally disregard the purpose of the antidiscrimination statutes, giving foreign corporations greater rights than those of domestic corporations.

If the United States does not abide by international agreements and treaties, it will lose the trust of foreign nations. A primary element that gives binding effect to international agreements is the sincerity and credibility of the nations in agreement.<sup>154</sup> If a nation has a history of breaching international agreements, other countries will not enter into agreements with it.<sup>155</sup> Therefore, if the United States passes a statute that conflicts with an existing international obligation, foreign nations might not abide by existing agreements, nor might they enter into future agreements.<sup>156</sup> From a foreign affairs standpoint, it is vital that the United States be trusted. On a strictly policy basis, the international treaty should be recognized regardless of the subsequent antidiscrimination statute.

Conversely, it may be argued that foreign corporations will receive an unfair advantage if they are not bound by the antidiscrimination statutes while domestic corporations remain bound due to the cost associated with added regulation of corporate activities. Granting preferential treatment to foreign corporations under the FCN Treaty would undermine the intent of the FCN Treaty as well as the statutes that were intended to promote equality. There is a cost involved in abiding by and enforcing the statutes, such as the limitation of managerial freedom, even if the act will result in a more efficient and profitable corporation. If the foreign corporations are exempt, the domestic corporations may suddenly find it difficult to compete. Although foreign investment is certainly important to the United States economy, the benefits afforded by the success of domestic corporations far outweigh the importance of foreign investment.

The purposes of the statutes and the Treaty were the same. While the statute attempts to guarantee an equal chance to individuals who would otherwise be at a disadvantage in seeking a particular position, the Treaty attempts to offer an equal chance

---

154. For reasons why nations observe international law, see L. Henkin, R. Pugh, O. Schachter & H. Smit, *supra* note 117, at 21 (citing L. HENKIN, *HOW NATIONS BEHAVE* (1979)).

155. *Id.*

156. As Professor Henkin observed, "Congress shows its disrespect for international law by enacting statutes inconsistent with it." Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524, 527 (1987).

to foreign corporations who would otherwise be disadvantaged in attempting to compete in a foreign marketplace.<sup>157</sup> Thus, to interpret the statutes and the Treaty any other way would be contrary to their intended purpose.

## VI. CONCLUSION AND RECOMMENDATION

The decision of the court of appeals is correct under United States law, and is consistent with the apparent intent of the United States legislature.<sup>158</sup> Under international law, however, the district court decision reaches the proper outcome.<sup>159</sup> In a diplomatic sense, it is vital for the United States to abide by international agreements. The enactment of statutes that conflict with such international agreements creates many problems and should not be permitted to continue in the future. Although several courts of appeal have reached different outcomes when faced with the conflict between the FCN treaties and Title VII and the ADEA,<sup>160</sup> the United States Supreme Court has refused to set a uniform rule or procedure for all courts. Congress has failed to correct the conflict by amending either the Treaty or the statutes. It is unfair that some foreign corporations have been bound by the antidiscrimination statutes while others have not, depending on the jurisdiction in which the action was brought.

Since the Supreme Court does not seem willing to set a uniform procedure for dealing with such conflicts, it is up to the legislature to enact such a procedure. A statute should be passed requiring an investigation and report by the State Department prior to the enactment of new statutes. This would confront foreseeable conflicts between the proposed statute and current international obligations. If the State Department finds such a conflict, the statute should require either amendment of the international obligation or amendment of the proposed statute in order to alleviate such a conflict. Thereafter, upon a State Department determination that the conflict no longer exists, the new statute may be enacted. In the alternative, if Congress does not wish to amend its international obligation or its proposed statute, Congress should be required to expressly state its intent

---

157. HENKIN, *supra* note 149, at 168.

158. See *supra* notes 103, 156.

159. See *supra* notes 144-50.

160. See *supra* notes 72-84.



in the newly enacted statute and how it wishes the courts to apply the statute in the face of a conflict.

With regard to the conflict between the FCN Treaty, Title VII, and the ADEA, the Supreme Court's recent refusal to hear this case has led to conflicting results in the circuit courts. Congress should recognize the problem that this creates and deal with it promptly. The laws of the United States are deemed to be the law of the land and thus should be applied consistently throughout the United States. Congress must not allow this conflict to be resolved differently from circuit to circuit. The statutory nature of this problem makes this a legislative function thus, this issue should not be left to the courts. Congress' prompt action to set a uniform outcome to this issue will alleviate future litigation with differing outcomes. Legislative action will enable the courts to uniformly apply a federal rule.

*Andrew J. Lauer*